Supreme Court, U.S
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No. 04-249

IN THE

Supreme Court of the United States

CHADWICK E. WELLS, PETITIONER

v.

CITY OF ALEXANDRIA; JOHN HAMERNICK;
WILLIAM GERARD ALWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I.

In the brief of respondents in opposition, they argued their view of the evidence that was submitted on the Motions for Summary Judgment. However, their brief does not address the main thrust of petitioner's petition, i.e. that the evidence petitioner submitted in opposition to their Motions for Summary Judgment was not construed by the lower courts in a light most favorable to him. This evidence consisted of petitioner's own sworn testimony and the sworn deposition testimony of seven (7) former co-employees, including petitioner's former immediate supervisor.

Additionally, petitioner avers that the rejection by the lower courts of his evidence was the result of their making credibility determinations, weighing the evidence and drawing subjective inferences from the facts, all functions prohibited by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) and Reeves v. Structural Preservation Systems, 731 So.2d 208, 211 (La. 1999).

It is undisputed that both Alwell and Hamernick knew that petitioner was required to attend physical therapy sessions by his treating physician after his knee surgery. They both urge in brief and it was accepted by the lower courts that they were not aware of petitioner's post-surgery medical restrictions on his knee.

The record shows that Alwell testified under oath he didn't remember if there was a question of whether Wells could perform all of his duties after his knee surgery. In contrast, petitioner's immediate supervisor Sigur testified that both Alwell and

Hamernick were aware of petitioner's post-surgery medical restrictions when they specifically ordered Sigur to have petitioner clean the condenser and the hot well. (App. I, pgs. 70a-74a) He had discussed it with them. Neither of the courts below address Sigur's testimony.

In addition, the knowledge of Alwell and Hamernick about petitioner's role in the State Police investigation against them is pertinent. Keith White, a fellow employee, testified that defendants knew of petitioner's involvement in the investigation and both were "mad" about it. (App. L, pgs. 89a-90a; 93a-94a) White stated that both Alwell and Hamernick told him they thought petitioner was one of the instigators of the investigation. (App. L, pgs. 92a-93a)

The evidence submitted by petitioner, if viewed in a light most favorable to petitioner, shows:

(1) While employed as an Operator 2 for the City of Alexandria, petitioner had knee surgery on his right knee on February 1, 2000. The surgery was performed by Dr. David Pope, an orthopaedic surgeon in Alexandria, Louisiana.

(2) Petitioner was released to return to his employment with the restriction that he could perform 90% of his job duties as shown on his job description. (Ex. R)* This was in compliance with the City's policy as set forth in its Memo of Pam Saurage dated November 25, 1997 (Ex. O)*.

(3) Petitioner was required to attend physical therapy sessions after he returned to work and he had several instances where his supervisors balked at letting him off of work to attend these sessions.

(4) On June 30, 2000, Keith White and petitioner contacted the Louisiana State Police in person to report that Alwell had been photographed loading red roofing material into his personal truck and trailer on June 12, 2000. The material was remaining after a new roof had been installed on the power plant by a City contractor. (Ex. M)* John Hamernick and his father-in-law also took some of the material.

(5) The Louisiana State Police investigated the complaint, including interviewing Alwell and going to his house where he had the roofing material stored.

(6) The Louisiana State Police contacted the City of Alexandria Public Works Director, Darrell Williamson, on July 14th concerning its investigation. (Ex. M)*

(7) The Louisiana State Police made a determination that Alwell and Hamernick had not violated any criminal laws and that they had

permission from the contractor to remove the red roofing material and channel iron. (Ex. M)*

(8) After the investigation was concluded, Alwell and Hamernick questioned several employees under their supervision at the power plant to ascertain which employees had instigated the investigation.

(9) Alwell ordered Keith White to his office and interviewed White in front of Hamernick about White's part in the investigation. Alwell indicated to White that he believed that Wells and another employee were involved. Alwell was "upset and mad" about being the subject of the investigation.

(10) Hamernick later told petitioner and two (2) other employees that he and Alwell were going to get even with those employees who instigated the investigation.

(11) At all times pertinent herein, petitioner was under post-surgery medical restrictions concerning his knee during his entire employment with the City after his February knee surgery. (App. E, pgs. 30a-41a)

(12) Alwell and Hamernick were aware of petitioner's post-surgery medical restrictions during the remainder of his employment with the City after his surgery. (App. I, pgs. 73a-74a)

(13) On or about August 11th, defendant Hamernick specifically ordered petitioner to strip and wax the floor of Turbine No. 4. At that time, the plant was generating electricity and petitioner was working as an Operator 1. (oiler) Petitioner protested the order stating his knee's physical restrictions wouldn't allow it. Petitioner was told by Hamernick to do the job or go home if he refused.

(14) Hamernick's order was given with Alwell's approval.

(15) Maintenance and janitorial work are not listed as a primary job duty on petitioner's job description as an operator.

(16) As a result of performing the stripping and waxing, petitioner re-injured his right knee. It became swollen and he was required to seek medical attention. (Ex. S-1)*

(17) As a result of being assigned to strip and wax the floor, petitioner's treating physician increased his restrictions to avoid janitorial duties, maintenance activities and prolonged standing. (Ex. T)*

(18) In January of 2001, petitioner was told by Alwell that he would have to be able to perform 100% of his work or go home. This was in directly contrary to the Memo from the City's Personnel Director, Pam Saurage, dated November 25, 1997. (App. P, pgs. 109a-110a)

(19) On or about February 3, 2001, defendant Hamernick specifically ordered petitioner to get into a hot well chamber and clean it; the hot well chamber being 2 ½ to 3 feet high and requiring a person in it to squat and crawl for several hours. Petitioner complied with this order under the threat of termination.

(20) On February 12th, petitioner was ordered to work inside a condenser unit. The job required climbing and working in a squatting position. Petitioner complied with this order.

(21) On February 21st, petitioner was again ordered to strip and wax the turbine floor.

(22) As a result of his performing the above work, petitioner re-injured his knee and had to seek medical attention. (Ex. S-2)*

(23) Defendant Hamernick was acting with full authority and knowledge of defendant Alwell which defendant Alwell admitted to petitioner. (App. G, pg. 57)

(24) As a result of the continued hostile working environment and continued harassment by the individual defendants, petitioner Wells resigned his employment in April of 2001.

In the District Court's written opinion granting defendants' Motions for Summary Judgment (App. B, pgs. 9a-23a), inexplicably, there is no mention of petitioner's evidence consisting of his deposition and the seven (7) depositions of his co-workers. This evidence is not referred to in the opinion and was completely ignored by the lower court.

Additionally on appeal, it appears that the Fifth Circuit cursorily reviewed petitioner's evidence of defendants' subjective intent and motives. It characterized petitioner's evidence as "colorable" and made an evidentiary determination that the defendants' anger at petitioner and a general desire to retaliate against him was not proof of a desire to physically injure him.

Petitioner submits that both of the lower courts' review of his evidence offered in opposition to

defendants' motions were directly contrary to this Court's pronouncements in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) and Reeves v. Structural Preservation Systems, 731 So.2d 208, 211 (La. 1999). There are reasonable direct and indirect inferences regarding defendants' actions toward petitioner that can be drawn in his favor from the evidence he offered in opposition to the motions. These inferences create genuine issues of material fact precluding summary judgment in this matter.

Petitioner submits that the playing field on which his claim was considered was skewed by the failure of the District Court and Court of Appeal to follow this Court's guidelines in *Anderson* and *Reeves*. Hence, the basis for this petition.

Further, in their response, defendants seek to mislead this Court by stating there was testimony by Hamernick and Alwell concerning petitioner's activities after surgery.

The evidence is that Hamernick testified that he knew Wells from work and had deer hunted with Wells one time prior to surgery. He didn't recall fishing with petitioner and he had seen him run upstairs and jump on the back of boats all before Wells' surgery. (Supp. App. Q, pgs. 111a-113a) There is no testimony in the record by Alwell on these points.

II.

Additionally, the Court of Appeal erred in considering deciding an issue not raised in the District Court below while denying petitioner an opportunity to rebut that issue. That question merits consideration by

this Court.

There is no evidence in the record that affirmatively supports the Fifth Circuit's conclusion that petitioner's activities were unrestricted by his doctor.

Prior to oral argument, no party ever argued or ever contended that petitioner was fully released by his treating physician to perform all of his job duties after his surgery. The record shows that everyone understood that petitioner was released to return to work at "light duty at 90%."

At the time he was ordered to strip and wax the turbine floor (August 11th), clean inside the hot well on February 3rd and clean inside the condenser unit of the turbine on February 12th, petitioner had not been fully released by his treating physician. The dispute among the parties has always been the extent of petitioner's 90% restriction, not whether or not any restrictions were in effect as found *sua sponte* by the Fifth Circuit.

After oral argument before the appellate court, in order to prevent an incorrect conclusion on this point on a ground that was not raised below by the parties or by the District Court, petitioner attempted to supplement the record with a complete certified copy of petitioner's treating physician's records which reflected the true facts regarding petitioner's medical restrictions upon his return to work. The Court of Appeal denied this motion. (App. E, pg. 42a) The Court then proceeded to make an adverse false and inaccurate factual finding against petitioner. Additionally, the Court buttressed its conclusion with a statement from defendants' brief that Hamernick had testified that he had seen Wells jump from the back of boats and run up

stairs which a simple perusal of the record would have disclosed that those events occurred prior to Wells' surgery and not after. See Supp. App. Q, pgs. 111a-113a.

III. Conclusion

Petitioner believes the lower courts deviated from the holding and guidelines set by this Court in *Anderson* and *Reeves*. Additionally, the Court of Appeals erred in determining an issue not raised in the District Court below while denying petitioner an opportunity to offer evidence to rebut that issue. Both of these points merit consideration by this Court.

Respectfully submitted,

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A DO YOU MEAN WHAT DO I REMEMBER ABOUT IT?

Q YES.

A BASICALLY I DON'T REMEMBER THE FIRST TIME I CAME IN CONTACT WITH HIM.

Q OKAY. HE WAS HIRED AS AN OPERATOR ONE?

A I BELIEVE SO. I WOULD HAVE TO REFER TO THE RECORDS TO MAKE SURE, BUT I BELIEVE SO.

Q OKAY. DO YOU KNOW WHOSE SHIFT HE WAS ORIGINALLY ON?

A NO, I DO NOT.

Q WERE YOU AWARE PRIOR TO HIS SURGERY THAT HE HAD A PROBLEM WITH HIS KNEE?

A NO, NOT THAT I REMEMBER.

Q WELL, WHEN DID YOU FIRST BECOME AWARE THAT HE HAD A PROBLEM WITH HIS KNEE?

A AS FAR AS FOR WITH THE CITY AND HIS EMPLOYMENT? I HAVE NEVER SEEN ANY ADVERSE ACTION THAT CHAD EVER HAD. I HAVE SEEN HIM JUMP FROM THE BACK OF BOATS, RUN UPSTAIRS.

MR. ROZANSKI :

I DON'T THINK HE IS UNDERSTANDING YOUR QUESTION.

MR. BROUSSARD:

YEAH, ALL RIGHT.

BY MR. BROUSSARD

Q MY QUESTION IS, YOU UNDERSTAND HE HAD A SURGERY? YOU ARE AWARE HE HAD SURGERY ON HIS RIGHT KNEE?

* * * * *

A YES.

Q OKAY. AND WHAT IS YOUR UNDERSTANDING OF WHAT THAT MEMORANDUM SAYS?

A IT STATES THIS - THAT YOU MUST BE CAPABLE OR ABLE TO PERFORM NINETY PERCENT OF THE DUTIES OUTLINED IN YOUR JOB DESCRIPTION WITHOUT LIMITATIONS BEFORE RETURNING TO WORK.

Q OKAY. DID YOU EVER TELL CHAD WELLS THAT THERE WASN'T ANY LIGHT DUTY FOR THE POWER PLANT WHEN HE CAME BACK FROM SURGERY?

A NOT THAT I RECALL.

Q DID YOU EVER HEAR ANYBODY TELL HIM THAT?

A I DIDN'T HEAR IT, NOT THAT I RECALL.

Q OKAY.

MR. BROUSSARD:

IN CONNECTION WITH HIS TESTIMONY THIS WILL BE HAMERNICK NUMBER FIVE - FOUR, I MEAN. YEAH.

BY MR. BROUSSARD:

Q WHEN YOU SAID YOU SAW CHAD JUMPING OUT OF BOATS AND ALL DID - WAS THIS BEFORE OR AFTER HIS SURGERY?

A BEFORE DEFINITELY.

Q DO YOU KNOW A LADY BY THE NAME OF BRENDA SANDERS?

A YES.

Q WHO IS BRENDA SANDERS?

A A PREVIOUS EMPLOYEE.

Q WAS SHE TERMINATED OR DID SHE JUST--